view that, such a requisition only applies to cases triable by the subordinate Court which, for some reason, is required by the public prosecutor to be tried by the High Court. So, as can be seen, the Dangerous Drugs Act sets out distinct procedures applicable to - on the one hand, cases triable exclusively by the High Court and on the other hand, cases triable by the subordinate Courts. In contrast, s. 11(1) of the Act makes no reference whatsoever to cases triable exclusively by the High Court.

For the reasons stated above, I am of the view that an offence under s. 3 or 3A of the Act, which is triable exclusively by the High Court, is outside the scope of s. 11(1). Consequently the special provisions relating to transmission of a case to, and trial by, the High Court as provided by the said s. 11, have no application to a case which relates to an offence under s. 3 or 3A of the Act.

It may well be the intention of the legislature, as urged upon me by the learned Deputy Public Prosecutor, to include ss. 3 and 3A within s. 11(1) of the Act. However, it is for the legislature to express the said intention in clear and unambiguous terms, as they had done in the case of the Dangerous Drugs Act. "It is well accepted that beliefs and assumptions of those who frame Acts of Parliament cannot make the law." - (per Lord Morris of Borthy Guest in *Davies v. Davies Jenkins & Co. Ltd.* [1967] 2 WLR 1139 at p. 1156).

For the above reasons, I am of the considered view that the order of the learned President is a nullity for want of jurisdiction. The said order is accordingly quashed and the cases remitted to the Sessions Court to be proceeded with in accordance with the provisions of the Criminal Procedure Code.

PUBLIC PROSECUTOR

v.

CHAN QUEE LONG

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[CRIMINAL APPEAL NO. 51-291-92]
26 JUNE 1993

APPEAL: Notice of appeal cannot be served on respondent - Whether s. 314 of the Criminal Procedure Code applies - Two options available to Appellate Court under s. 314 of the Criminal Procedure Code - Whether s. 313(ii) could be invoked "shall be liable" - Whether Court has discretion to award a sentence of imprisonment or to act under s. 294 or s. 173A of the Criminal Procedure Code "shall be punished" - Requirement of Courts to impose imprisonment, even for one day.

SENTENCE: Common Gaming Houses Act 1953 - Section 4A(a) - Respondent pleaded guilty to charge and sentenced to 1 year's imprisonment and fined RM5,000 in default 500 days' imprisonment - Respondent served his imprisonment sentence in full but did not pay fine - Deputy Public Prosecutor appeals against inadequacy of sentence - Powers of Appellate Court - Whether Magistrate had fallen into error.

This was an appeal by the learned Deputy Public Prosecutor against the inadequacy of sentence for an offence under s. 4A(a) of the Common Gaming Houses Act 1953.

Held:

[1] In view of the absent respondent, the Court exercised its powers under s. 314 of the Criminal Procedure Code, dismissed the appeal by the learned Deputy Public Prosecutor and affirmed the sentence imposed on the respondent by the learned Magistrate.

[2] The amended s. 4A(a) of the Common Gaming Houses Act 1953 (Act 289) by employing the words "shall be liable" give the Courts an absolute discretion as to whether it shall award a sentence of imprisonment or impose a fine or if need be, deal with the accused under the provisions of s. 294 or s. 173A of the Criminal Procedure Code. The words "shall be punished" require the Court to impose imprisonment even for one day, according to the circumstances of the case.

[3] In this particular case, the Court had in mind the limitation that "the Court shall not

make any order in the matter of the appeal adverse to or to the prejudice of the (absent) respondent" and did not interfere with the sentence imposed by the learned Magistrate.

[4] However, the Court gave a warning that in future such offences may attract more severe sentences including a minimum fineof RM20,000 and imprisonment for a term not exceeding five years.

[Appeal by DPP against inadequacy of sentence dismissed].

Cases referred to:
*PP v. Goh Thor Kiah [1952] MLJ 91 (**refd**)*
*Rahim bin Usoff & Ors. v. Public Prosecutor [1984] 2 CLJ 121/[1985] 1 MLJ 241 (**refd**)*
*PP v. Man bin Ismail [1939] MLJ 207 (**refd**)*
*PP v. Lee Ah Sam [1949] MLJ 236 (**refd**)*
*PP v. Wahab [1964] MLJ 265 (**refd**)*
*Jayanathan v. PP [1973] 2 MLJ 68 FC (**refd**)*
*PP v. Yong Thiam Fatt [1980] 2 MLJ 145 (**refd**)*
*PPv. MohamedNor & Ors. [1985] 2 MLJ 200 (**refd**)*
*Chang Liang Sang & Ors. v. PP [1982] CLJ 399/ [1982] 2 MLJ 231 (**refd**)*

Legislation referred to:
Common Gaming Houses Act 1953, s. 4A(a)
Corrosive and Explosive Substances and Offensive Weapons Ordinance 1958, s. 6(1)
Criminal Procedure Code, ss. 173A, 294, 313(ii), 314
Emergency Regulations 1948, regulation 5(1)
Penal Code, s. 298A(1)
Prevention of Crime Ordinance 1953, s. 15(4)
Road Traffic Ordinance 1958, s. 47
Vagrants and Decrepit Persons Enactment, s. 3(a)

For the public prosecutor - Yong Zarida bte. Sazali, DPP
Respondent absent

JUDGMENT

Haji Abdul Malik bin Haji Ishak JC:
In this case, the respondent was charged in the Magistrate's Court, Grik, Perak as follows:

> Bahawa kamu pada 16 November 1990 jam lebih kurang pukul 1.45p.m., dihadapan rumah No. 226, Kg. Baru, Batu Dua Gerik, di dalam Daerah Hulu Perak, di dalam Negeri Perak, telah didapati tolong menjalankan loteri umum 1000 hingga 10,000 angka loteri haram, oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah s. 4A(a) Akta Rumah Perjudian Terbuka 1953 (Pindaan Tahun 1990).

The respondent pleaded guilty to the charge on 25 April 1991 in the Court below and he was sentenced to 1 year's imprisonment and fined a sum of RM5.000 in default 500 days' imprisonment. The respondent served his imprisonment sentence in full. The fine was not paid by the respondent. The learned Deputy Public Prosecutor has now appealed against inadequacy of sentence.

The case came up for hearing on six occasions before it was finally disposed of. Each time the case came up for hearing, it had to be postponed as the notices for the appeal could not be served. The case came up for hearing on the following dates, viz 1 December 1992,11 February 1993, 8 April 1993, 12 April 1993, 20 April 1993 and finally on 7 May 1993.

On 7 May 93 when the case came up for hearing, the learned Deputy Public Prosecutor informed the Court that the notice could not be served on the respondent and that the respondent had served his imprisonment sentence and was released by the Prisons Department on 3 February 1992. The learned Deputy Public Prosecutor rightly informed the Court that the case had been fixed for hearing on five previous occasions (inclusive of the present date of appeal, it would be the sixth occasion). The learned Deputy Public Prosecutor boldly made a concession and left the matter entirely to the Court. The Court proceeded to hear the appeal by virtue of s. 314 of the Criminal Procedure Code ("CPC") which reads as follows.

> 314(i) If, at the hearing of the appeal, the respondent is not present and the Court is not satisfied that the notice of appeal was duly served upon him, then the Court shall not make any order in the matter of the appeal adverse to or to the prejudice of the respondent, but shall adjourn the hearing of the appeal to a future day for his appearance, and shall issue the requisite notice to him for service through the Registrar.
>
> (ii) If the service of such last-mentioned notice cannot be effected on the respondent, the Court shall proceed to hear the appeal in his absence.

Clearly, s. 314 of the Criminal Procedure Code gives the appellate Court two options. Firstly, if the respondent is absent and it is clear to the appellate Court that the notice of appeal was not duly served upon him, the appellate Court shall not make any order in the matter of the appeal adverse to or to the prejudice of the respondent, but shall adjourn the hearing of the appeal to a later day, and the Registrar shall issue the

requisite notice of service to him. Secondly, if the service of the notice cannot be effected on the respondent, the appellate Court shall proceed to hear the appeal in his absence.

Taylor J. in *PP. v. Goh Thor Kiah* [1952] MLJ 91 had occasion to consider the second option, that is, under s. 314(ii) of the Criminal Procedure Code and he took the view that: "the incongruity of sentencing a man without his having had the opportunity to be heard" was worthless as there would not be a fair prospect of the sentence being enforced. The prosecution had in that case sought to have s. 314(ii) of the Criminal Procedure Code to be applied, by urging the Court to hear the appeal in the absence of the respondent. Taylor J. disagreed with the prosecution and this is what he had to say:

> ... (this) construction is surprising in that it involves the provision that a person who has been acquitted in one of the lower Courts might have his acquittal reversed and a conviction substituted and sentence passed and that he might be arrested and imprisoned without having any further opportunity whatsoever to present his side of the case. Such a construction is a plain violation of the fundamental principle *audi alterant partem* and in my view, is wholly opposed to all our principles of judicial procedure.

Incidentally, by way of analogy, Shankar J. in *Rahim bin Usoff & Ors. v. Public Prosecutor* [1985] 1 MLJ 241 had occasion to consider the position of the appellant who was absent at the hearing of his appeal and invoked s. 313(ii) of the Criminal Procedure Code by refusing to consider the appeal further and ordered that the appeal be dismissed. His Lordship had this to say:

> In these circumstances I have exercised my powers under s. 313(ii) of the Criminal Procedure Code and have accordingly directed that this Court will in all the circumstances refuse to consider the appeal further and hereby makes an order that the appeal of the third appellant Juraimi bin Suid is hereby dismissed.

In the instant appeal, I proceeded to hear the appeal in the absence of the respondent holding steadfast to the limitation that "the Court shall not make any order in the matter of the appeal adverse to or to the prejudice of the (absent) respondent". The learned Deputy Public Prosecutor submitted that the sentence imposed by the learned Magistrate was wrong in law. By this, she meant, as I understood her correctly, that the sentence as provided under s. 4A(a) of the Common Gaming Houses Act 1953 (Revised 1983) ("CGH") was not complied with by the learned Magistrate. Section 4A(a) of the CGH was amended by Act A755/90 and came into effect on 23 February 1990 enhancing the sentence to be:

> ... shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than twenty thousand ringgit and not more than two hundred thousand ringgit and shall also be punished with imprisonment for a term not exceeding five years.

There are two parts in the sentencing aspect of s. 4A(a) of the CGH which must be considered. The first part would be tied to the words "shall be liable" and the second part would be constrained by the words "shall be punished".

There are quite a number of authorities as to the meaning of the words "shall be liable". In *PP v. Man bin Ismail* [1939] MLJ 207 where Aitken J. had to consider s. 3(a) of the Vagrants and Decrepit Persons Enactment which provides that the offender "shall be liable to imprisonment for six months" and his Lordship was of the view that the words "shall be liable" give the Court an absolute discretion as to whether it shall award a sentence of imprisonment or deal with the accused under and in accordance with the provision of s. 294 of the CPC. Aitken J. had this to say:

> If the legislature had intended that all persons convicted of an offence against this s. 3(a) of the Vagrants and Decrepit Persons Enactment should be sent to prison, whatever the circumstances may be, it would have used the expression "shall be punished with imprisonment", which is to be found so frequently in our Penal Code.

In *PP v. Lee Ah Sam* [1949] MLJ 236 Willan CJ had to consider regulation 5(1) of the Emergency Regulations 1948 which provides that the offender "shall be liable to be punished with death or with penal servitude for life and whipping". His Lordship was of the view that the sentence of penal servitude for life is a maximum sentence and any lesser sentence of penal servitude may be imposed. It was further held that the sentence of whipping is discretionary and not mandatory and that the death penalty too is not mandatory.

In *PP v. Wahab* [1964] MLJ 265 for an offence under s. 6(1) of the Corrosive and Explosive

Substances and Offensive Weapons Ordinance 1958 an offender "shall be liable to imprisonment for a term not exceeding two years and to whipping" and Hashim J. took the view that a term of imprisonment is not mandatory and a fine may be imposed in lieu of imprisonment. Accordingly, a fine of RM50 was imposed in lieu of imprisonment. The whipping sentence, though discretionary, stood unamended.

Ong Hock Sim FJ speaking for the Federal Court in *Jayanathan v. PP* [1973] 2 MLJ 68 FC, involving s. 15(4) of the Prevention of Crime Ordinance 1953 (the relevant words being "shall be liable to imprisonment for a term not exceeding five years and not less than two years"), referred to and agreed with *Man bin Ismail* (*supra*) where Aitken J. held that the words "shall be liable" allow the Court to apply s. 294 of the Criminal Procedure Code and there is no need to impose a prison sentence at all. His Lordship held further that if the Courtis minded to send the offender to prison, it must impose a term of not less than 2 years. His Lordship further stressed that the fact that a maximum and minimum term is provided makes no difference and does not displace what was stated in Man bin Ismail (supra) because of the phrase "instead of sentencing him at once to any punishment" appearing in s. 294 of the Criminal Procedure Code which in effect allows for suspension of any sentence.

In *PP v. Yong Thiam Fatt* [1980] 2 MLJ 145 for an offence under s. 47 of the Road Traffic Ordinance 1958 an offender "shall be liable to imprisonment for a term not exceeding three months or to a fine not exceeding one thousand dollars or to both such imprisonment and fine ...". His Lordship Harun J. (as he then was) referred toJayanathan v. PP (supra) and agreed that the Court may exercise its powers under s. 173A of the Criminal Procedure Code provided that a conviction is not recorded.

From the tenor of the cases discussed above, the words "shall be liable" give the Court an absolute discretion as to whether it shall award a sentence of imprisonment or to impose a fine or deal with the accused under and in accordance with the provisions of s. 294 or s. 173A of the Criminal Procedure Code.

There is a dearth of reported cases on the meaning of the words "shall be punished". All these reported cases require the Courts to impose imprisonment, even for one day, as required. However, in *PP v. Mohamed Nor & Ors.* [1985] 2 MLJ 200 the trial Judge had to consider s. 298A(1) of the Penal Code which provides that the offender "shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both". The trial Judge made an order under s. 294 of the Criminal Procedure Code whereupon that public prosecutor appealed against inadequacy of sentence. Abdul Hamid CJ (now Lord President) in delivering the judgment of the Supreme Court, confirmed the order but added that in future such offences may attract more severe sentences including custodial sentence.

Now, the respondent in the instant appeal had served his prison sentence and was discharged from the Prisons Department on 3 February 1992 long before the appeal first came up for hearing on 1 December 1992. With respect, this appeal could have been disposed of before the respondent was discharged from prison provided some form of monitoring be exercised by the relevant officer in the Attorney-General's Chambers, Ipoh, Perak. Surely the respondent must have thought that after having served his prison term he has fully paid his debt and would not be required to attend Court on the same matter. That explains the difficulty in effecting service of the notice on him. Be that as it may, I have exercised my powers under s. 314 of the Criminal Procedure Code and in view of the absent respondent, I dismissed the appeal by the learned Deputy Public Prosecutor and affirmed the sentence imposed on the respondent by the learned Magistrate. In so doing, I took into consideration that the amended s. 4A(a) of the CGH by employing the words "shall be liable" give the Court an absolute discretion as to whether it shall award a sentence of a fine or if need be, deal with the accused under the provisions of s. 294 or s. 173A of the Criminal Procedure Code. I also took into consideration that the words "shall be punished" give the Court the power to impose, even a day's imprisonment, according to the circumstances of the case. I also had in mind the limitation that "the Court shall not make any order in the matter of the appeal adverse to or to the prejudice of the (absent) respondent". I also bore in mind the sage observations of Taylor J. in *PP v. Goh Thor Kiah (supra)* as stated in the early part of this judgment, especially that part about the *audi alteram partem* principle. The magnanimous gesture of the learned Deputy Public Prosecutor

in making a concession and leaving the matter entirely to the Court (indicative of the adequateness of the sentence as imposed by the learned Magistrate, and the changing mood of the public prosecutor) was also rightly taken into account. However, 1 must signal a warning that in future such offences may attract more severe sentences including a minimum fine of RM20,000 and imprisonment for a term not exceeding five years. But if the circumstances warrant it or to borrow the words of Raja Azlan Shah CJ (as His Royal Highness then was) in the case of *Chang Liang Sang & Ors. v. PP* [1982] 2 MLJ 231, viz "in the most exceptional circumstances", a binding over under s. 294 of the Criminal Procedure Code may be considered. Lest l be accused of an oversight, I have not overlooked the principle that in an appeal against inadequacy of sentence, the appellate Court must consider whether the learned Magistrate had fallen into error by taking into consideration matters which he should not have or by committing some error of law.

Order accordingly.

PUBLIC PROSECUTOR

v.

MANSOR BIN MD. RASHID & 2 ORS.

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HJ. ISHAK JC
[CRIMINAL TRIAL NO. 58-10-92]
28 JUNE 1993

DANGEROUS DRUGS: Trafficking - Agent provocateur - Break in chain of evidence - Whether the cannabis that was seized and analysed was the same that wag returned - Informer playing active role - Failure to call or offer - The effect of it - Fingerprints - Sections 37(6), (g), 39B(l)(a), (2), 40(1) DDA 1952 - Evidence Act 1950, s. 114(g).

A police party, wherein one Busra acting as an agent provocateur with the help of Cholar, an informer arrested the accused persons. The 1st and 2nd accused played an active role. The 3rd accused was merely a tenant in the house that was raided. The drugs that was seized was analysed by a Government Chemist. However there was not a shred of evidence adduced by the prosecution as to how the Government Chemist handled the drugs in her office. Cholar, in this case, apart from being an informer, introduced Busra to the 2nd accused and witnessed the purchase of the drugs and also participated in the trap.

Held:

[1] There was not a shred of evidence adduced by the prosecution as to how the Government Chemist handled the compressed plant material in her office. The prosecution failed miserably to show positively the appropriate steps taken by the Government Chemist to assure the safe custody of the compressed plant materials. Now, only the remainder of the plant material in loose forms are put in a transparent plastic packet and marked as exhibit P8. In the state in which the cannabis is now (P8), it is doubtful whether the Government Chemist returned the very same cannabis which she received from Inspector SuhaimiHashim to Inspector Suhaimi Hashim. In short, it is doubtful whether P8 is the very cannabis seized by Badaruddin from house No. 129.

[2] The third accused had no care and management of the premises and therefore he was not occupier for the purposes of the application of the presumptions under s. 37(b) and (g) of the